

**NOT FOR CITATION**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

No. CR 05-0125 PJH

v.

**ORDER GRANTING DEFENDANT'S  
MOTION TO SUPPRESS**

KENNETH KELLEY,

Defendant.

Defendant Kenneth Kelley's ("Kelley") motion to suppress came before the court for a hearing on June 8, 2005. At the hearing, the court GRANTED Kelley's motion in part, as set forth on the record and summarized below.

**INTRODUCTION**

On March 3, 2005, Kelley was indicted for violation of 18 U.S.C. § 2252A(a)(2), possession of child pornography, and § 2252A(a)(5)(B), receipt of child pornography. On May 4, 2005, Kelley filed the instant motion in which he sought to suppress the physical evidence arising from a November 23, 2004 search of his email account with America Online ("AOL"), and related screen names.

**BACKGROUND**

The charges against Kelley stem from a German investigation of a German citizen, Herbert Mumenthaler. On November 11, 2003, German police executed a search warrant at Mumenthaler's residence in Dusseldorf, Germany, resulting in a seizure of Mumenthaler's computers. German authorities conducted a forensic analysis of the computers and discovered twenty-five outgoing emails and four hundred fifty incoming emails that contained child pornographic attachments. Many of the email addresses found on Mumenthaler's

1 computers originated in the United States. 11/23/04 Affidavit in Support of Search Warrant at  
2 par. 5.

3 Among the emails discovered on Mumenthaler's computers, which originated in the  
4 United States, were four containing the screen name "Gay1Dude." Further analysis "revealed  
5 that 'Gay1Dude' received four emails containing child pornographic attachments." 11/23/04  
6 Affidavit in Support of Search Warrant at par. 8. However, it is not clear whether those four  
7 emails were recovered in Mumenthaler's outgoing or incoming emails, or where on  
8 Mumenthaler's computer they were in fact recovered.

9 The four emails were sent to "Gay1Dude" by senders with four different screen names,  
10 including "Krefi," "Xpicssix," "Picasso10532884," and "RIMMER1212." All of the four emails  
11 contained child pornographic attachments. However, as Kelley has noted, three of the four  
12 emails were inexplicably dated following the seizure of Mumenthaler's computer.<sup>1</sup>

13 Subsequently, the German authorities forwarded a list of the email addresses  
14 originating in the United States, as discovered on Mumenthaler's computer, to United States  
15 Immigration and Customs Enforcement ("ICE") in Frankfurt, Germany. Frankfurt ICE then, on  
16 June 25, 2004, approximately seven months after German authorities' seizure of  
17 Mumanthaler's computers, forwarded the information to ICE Cyber Crimes in Virginia.  
18 Several days later, on June 30, 2004, ICE issued a customs summons to AOL for subscriber  
19 information concerning 108 AOL screen names discovered on Mumenthaler's computer  
20 originating in the United States.

21 On July 23, 2004, AOL returned to ICE the information requested in the customs  
22 summons regarding the screen names originating in the United States. AOL confirmed that  
23 the screen name "Gay1Dude" was registered to defendant Kelley and was active. It further  
24 provided seven additional screen names associated with Kelley's AOL account, and  
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26 <sup>1</sup>The first email, sent by "Krefi" to "Gay1Dude" was dated October 26, 2003. Two others,  
27 sent by "Xpicssix" and "Picasso10532884" were dated November 25, 2003, two weeks after the  
28 November 11, 2003 seizure of Mumenthaler's computer, and one more sent by "RIMMER1212"  
was dated November 27, 2003.

1 confirmed a recent login, from July 18, 2004, utilizing one of Kelley's screen names.

2 Thereafter, on September 29, 2004, ICE agent and affiant, Michael Allen, confirmed that the  
3 credit card used to pay for the AOL account was owned by defendant Kelley.

4 On November 23, 2004, ICE agents obtained a search warrant from a magistrate  
5 judge for Kelley's AOL account(s) associated with the eight screen names referred to above.  
6 In January 2005, AOL returned information based on the 11/23/04 search warrant regarding  
7 Kelley's AOL account, which revealed more than 500 images of child pornography sent and/or  
8 received by Kelley. It is this evidence associated with the 11/23/04 AOL search warrant that  
9 Kelley seeks to suppress.

10 Subsequently, on February 10, 2005, "as a result of the information seized from AOL  
11 regarding Kelley's AOL accounts, [a] Magistrate Judge [] authorized a[n] . . . arrest and search  
12 warrant for Kelley and Kelley's residence." Govt's 5/18/05 Opposition at 6. Pursuant to the  
13 second warrant, agents seized Kelley's computer and additional child pornography  
14 discovered at Kelley's residence.

### 15 ISSUES

16 In the instant motion, Kelley contends that the 11/23/04 search was unlawful  
17 because (1) there was insufficient probable cause supporting the search warrant; (2) the  
18 information in the search warrant affidavit was stale; and (3) the search warrant was  
19 overbroad and lacked particularity. Kelley also argues that this court should conduct a hearing  
20 pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), because the affiant's statements were  
21 recklessly made.

22 The government argues that even if this court were to determine that there was not  
23 sufficient probable cause to support the 11/23/04 search warrant, the good faith exception to  
24 the exclusionary rule applies under *United States v. Leon*, 468 U.S. 897 (1984).

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### 27 DISCUSSION

1 For the reasons set forth on the record, and summarized below, this court GRANTS  
2 Kelley's motion because there was not sufficient probable cause to support the 11/23/04  
3 search warrant, the information supporting the warrant was stale, and *Leon's* good faith  
4 exception is not applicable.

5 **I. Lack of Probable Cause**

6 The sworn affidavit in support of a search warrant must establish probable cause.  
7 Fed.R.Crim.P. 41(d)(1). The test to be applied is whether, using common sense and  
8 considering the totality of the circumstances, a magistrate judge can reasonably conclude that  
9 there is a "fair probability" that contraband or evidence of a crime will be found in the place to  
10 be searched. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "[A] magistrate judge must look to  
11 the totality of the circumstances to determine whether the supporting affidavit establishes  
12 probable cause." *United States v. Alvarez*, 358 F.3d 1194, 1203 (9<sup>th</sup> Cir. 2003).

13 In concluding that probable cause is lacking, this court has considered the authorities  
14 cited by the parties, considering especially the Ninth Circuit's decisions in *United States v.*  
15 *Gourde*, 382 F.3d 1003 (9<sup>th</sup> Cir. 2004) (affidavit in support of search warrant lacked sufficient  
16 indicia of probable cause because it contained no evidence that defendant actually  
17 downloaded or otherwise possessed child pornography); *United States v. Hay*, 231 F.3d 630  
18 (9<sup>th</sup> Cir. 2000) (upholding search warrant where supporting affidavit established that  
19 defendant had actually received via direct digital transfer nineteen images of child  
20 pornography); *United States v. Lacy*, 119 F.3d 742 (9<sup>th</sup> Cir. 1997) (concluding that probable  
21 cause existed because there was sufficient evidence demonstrating defendant's actual  
22 possession of child pornography where affidavit stated that defendant had actually  
23 downloaded at least two images); and *United States v. Weber*, 923 F.2d 1338, 1342 (9<sup>th</sup> Cir.  
24 1990) (warrant lacked sufficient probable cause that child pornography would be discovered).

25 First, contrary to the government's characterization of Kelley in its papers, there was no  
26 evidence at the time the 11/23/04 search warrant was issued that demonstrated an  
27 "exchange" or "trade" of child pornography between Kelley and Mumenthaler – as opposed to  
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1 simply the receipt of four emails and attachments by Kelley's AOL account. Instead, all that  
2 was known to the government at the time that the search warrant was issued was that emails  
3 to Kelley, which originated from four separate senders, somehow "ended up" on Mumenthaler,  
4 an active trader's computer. The government provided no technical explanation for how this  
5 occurred. This court – and the magistrate judge – were given no information regarding  
6 whether the offending images were attached to emails from one of the four separate senders  
7 to Mumenthaler with a copy to Kelley; or whether the images were attached to emails from  
8 Mumenthaler to one of the four senders with a copy to Kelley; or whether the senders or  
9 Mumenthaler forwarded emails received from each other to Kelley; or some other scenario  
10 entirely. What is lacking is a direct connection between Kelley and Mumenthaler, the known  
11 trafficker, which, had it existed and been presented to the magistrate judge, could have  
12 provided sufficient indicia of probable cause.

13        Additionally, there was no evidence that the owners of the four email addresses that  
14 sent the pornography to Kelley were themselves active traders or traffickers in child  
15 pornography, or that the four other senders were connected to Mumenthaler. Finally, there  
16 was no evidence that Kelley had opened or downloaded the pornographic images attached to  
17 the four emails. Based on the information provided to the magistrate judge and to this court,  
18 Kelley could have simply been copied on, or the recipient of, a forwarded email exchange  
19 between two other people – without his knowledge. In the absence of evidence that Kelley  
20 solicited the images or of a direct connection between Kelley and a known child pornography  
21 trafficker, receipt by Kelley's email account of four offending emails is not sufficient for a  
22 finding of probable cause.

23        Although the government now claims to have more information in support of probable  
24 cause, this court looks to what was presented to the magistrate judge at the time the warrant  
25 was issued. "In reviewing the magistrate's decision that probable cause existed, [this court is]  
26 limited to the information contained within the four corners of the affidavit[] supporting the  
27 application for the search warrant." *United States v. Huguez-Ibarra*, 954 F.2d 546, 552 (9<sup>th</sup>  
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1 Cir. 1992); *see also United States v. Taylor*, 716 F.2d 701, 705 (9<sup>th</sup> Cir. 1983). Like the  
2 Ninth Circuit in *Gourd*, this court concludes that probable cause is lacking because the  
3 affidavit underlying the search warrant here “fail[ed] to draw the crucial link between [Kelley’s]  
4 having some attenuated connection to child pornography and his actually possessing it.” 382  
5 F.3d at 1010.

## 6 **II. Staleness**

7 “An affidavit must be based on facts ‘so closely related to the time of the issue of  
8 warrant as to justify a finding of probable cause at that time.” *Lacy*, 119 F.3d at 745 (citing  
9 *Durham v. United States*, 403 F.2d 190, 193 (9<sup>th</sup> Cir. 1968)). However, “the mere lapse of  
10 time is not controlling.” *Id.* Staleness is “evaluate[d] in light of the particular facts of the case  
11 and the nature of the criminal activity and property sought.” *Id.*

12 Here, the search warrant affidavit does not adequately justify the continuing validity of  
13 the information concerning Kelley in light of the fact that almost a year had passed before the  
14 warrant was issued. While the government explains that six months of the delay was caused  
15 by the German authorities’ delay in forwarding the information to ICE, this nonetheless does  
16 not adequately justify why the information had not gone stale as to Kelley. The affidavit  
17 contained no information, for example, supporting a finding that Kelley could be considered a  
18 child pornography hoarder, or that his receipt of child pornography was ongoing. *Cf. Hay*, 231  
19 F.3d at 636 (Ninth Circuit declined to institute rule that all child pornographers keep  
20 pornography collections indefinitely, but found warrant still viable despite a 10-month delay,  
21 noting “good reasons” to believe that images downloaded previously would remain on the  
22 defendant’s computer based on specific allegations in the affidavit by an affiant with  
23 specialized knowledge of the subject). The affiant in this case appears to have had limited  
24 experience with these types of cases, and the affidavit contains no allegation in support of a  
25 finding that the images were likely to be found on Kelley’s computer a year later.

## 26 **III. Good Faith Exception**

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1 Even if an affidavit lacks sufficient evidence on which to find probable cause, the court  
2 may nevertheless apply the good faith exception if an objectively reasonable basis existed  
3 that the warrant was valid. *Leon*, 468 U.S. at 923. “It is necessary to consider the objective  
4 reasonableness not only of the officers who eventually executed a warrant, but also of the  
5 officers who originally obtained it.” *Gourde*, 382 F.3d at 1013 (quoting *Leon*, 468 U.S. at 923  
6 n.24). In both *Lacy* and *Weber*, the Ninth Circuit declined to apply the good faith exception  
7 where “the officers felt little or no time pressure to conduct the search of [the defendant’s]  
8 residence,” and where the officers had waited several months to obtain the warrant. See  
9 *Gourde*, 382 F.3d at 1014 (discussing *Lacy* and *Weber*).

10 Here, the government has not shown any exigent circumstances requiring immediate  
11 execution of the warrant. Nor has it explained the failure to investigate the misleading  
12 chronological information associated with the four emails discovered on Mumenthaler’s  
13 computer. There was also no indication of ongoing activity in the affidavit.

14 Because the government was not operating under time pressure, could have  
15 conducted further investigation to determine the nature of the date discrepancies, and could  
16 have conducted further investigation to corroborate whether the information as to Kelley  
17 remained viable in light of the 12 month delay, the good faith exception does not apply.  
18 *Gourde*, 382 F.3d at 1013-14 (failure to examine computer or otherwise provide  
19 corroborating evidence in child pornography case objectively unreasonable and sufficient to  
20 defeat *Leon* exception).

#### 21 **IV. Particularity/Overbreadth of Warrant**

22 For the reasons stated on the record, this court rejects Kelley’s argument that the  
23 warrant was overbroad. Had sufficient probable cause existed to search the screen name  
24 “Gay1Dude,” then there would have also been sufficient probable cause to search the other  
25 screen names associated with Kelly.

#### 26 **V. Request for *Franks* Hearing**

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1 There is "a presumption of validity with respect to the affidavit supporting [a] search  
2 warrant." *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). However, in *Franks*, the  
3 Supreme Court held that:

4 [W]here the defendant makes a substantial preliminary showing that a false  
5 statement knowingly and intentionally, or with reckless disregard for the truth,  
6 was included by the affiant in the warrant affidavit, and if the allegedly false  
statement is necessary to the finding of probable cause, the Fourth Amendment  
requires that a hearing be held at the defendant's request.

7 438 U.S. at 155-56.

8 A *Franks* hearing is held to investigate the veracity of the affiant. *United States v. Dozier*, 844  
9 F.2d 701, 704 (9<sup>th</sup> Cir. 1988).

10 A party moving for a *Franks* hearing bears the burden of proof and must make a  
11 substantial showing to support the elements entitling him to a *Franks* hearing. *United States*  
12 *v. Chavez-Miranda*, 306 F.3d 973, 979 (9<sup>th</sup> Cir. 2002). There is a five-prong test that must be  
13 met in the Ninth Circuit in order for a defendant to receive a *Franks* hearing: (1) the defendant  
14 must make specific allegations that indicate the portions of the warrant claimed to be false; (2)  
15 there must be a contention of deliberate falsehood or reckless disregard for the truth; (3) the  
16 allegations must be accompanied by a detailed offer of proof, preferably in the form of  
17 affidavits; (4) the offer of proof must challenge the veracity of the affiant, not that of his  
18 informant; (5) the challenged statements in the affidavit must be necessary to a finding of  
19 probable cause. *United States v. Kiser*, 716 F.2d 1268, 1271 (9<sup>th</sup> Cir. 1983).

20 Kelley suggests that he is entitled to a *Franks* hearing because the government's  
21 failure to reconcile the date inconsistency associated with the four emails and the affiant's  
22 characterization of the emails as "received," when there was no evidence of actual personal  
23 receipt (i.e., the opening or downloading of the attachments to the emails) by Kelley,  
24 constituted reckless disregard for the truth. For the reasons stated on the record, this court  
25 rejects Kelley's arguments and denies his request for a *Franks* hearing.  
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## 27 CONCLUSION


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1 For the reasons stated on the record and as set forth above, this court GRANTS  
2 Kelley's motion to suppress evidence obtained in conjunction with the 11/23/04 search of his  
3 AOL account(s) because probable cause was lacking and because the information in the  
4 search warrant affidavit was stale. Additionally, the court finds the good faith exception  
5 inapplicable under the circumstances of this case.

6 **IT SO ORDERED.**

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9 Dated: June 17, 2005

  
10 PHYLLIS J. HAMILTON  
11 United States District Judge  
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